

# **EXHIBIT 21**

Picard v Merkin

Jeffrey Weingarten 7/15/2015

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In Re:

BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Adv. Pro. No.  
08-01789(BRL)

Debtor.

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IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff, Adv. Pro. No.  
09-1182(BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL, L.P., ARIEL FUND LTD., ASCOT PARTNERS, L.P., GABRIEL CAPITAL CORPORATION,

Defendants.

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\* \* \*

VIDEOTAPED DEPOSITION  
OF JEFFREY M. WEINGARTEN

\* \* \*

TRANSCRIPT of testimony as reported by NANCY C. BENDISH, Certified Court Reporter, RMR, CRR and Notary Public of the State of New York, at the offices of Baker Hostetler, 45 Rockefeller Plaza, New York, New York, on Wednesday, July 15, 2015, commencing at 10:10 a.m.

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1 returns.

2 Q. And was Madoff -- is it your  
3 understanding -- strike that.

4 Was Madoff running a split-strike  
5 conversion strategy?

6 A. Yes. He was running a  
7 split-strike conversion strategy.

8 Q. When you say better than would be  
9 expected from a typical split-strike, what do  
10 you mean by better -- what do you mean by better  
11 than?

12 A. Well, as I said before, if the  
13 split-strike conversion strategy, for example,  
14 was put on at the beginning of the year and left  
15 on for the entire year, I would have expected  
16 returns to be not quite as good as they were.

17 Q. So it's just the length of the  
18 execution and the strategy would result in lower  
19 returns; is that correct?

20 A. I think I might say it the  
21 opposite, that by being in the market at certain  
22 times and being out of the market at certain  
23 times, it was possible to do better than staying  
24 in the markets the entire time.

25 Q. Do you -- have you done an

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1 analysis on the returns in the Merkin fund BLMIS  
2 accounts?

3 A. I've looked at the funds in the  
4 Merkin accounts, yes.

5 Q. Have you done an analysis of the  
6 transactions that occurred in the Merkin fund's  
7 BLMIS accounts?

8 A. I've certainly looked at some of  
9 the transactions that occurred in the account,  
10 yes.

11 Q. When you say some of the  
12 transactions, what do you mean by that?

13 A. Well, I can't say that I've looked  
14 at every single transaction done over the entire  
15 period in which Merkin was invested with Madoff.

16 Q. Okay. Can you tell me  
17 approximately how many transactions you've  
18 looked at?

19 A. No, I can't. Only because I don't  
20 remember. I've looked at a number of  
21 transactions and I've looked at -- I've looked  
22 at a number of transactions. I can't tell you  
23 how many of the transactions I looked at.

24 Q. Did you look at the -- I'm sorry  
25 to be flipping around, but --

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1 A. That's okay, I can manage.

2 Q. Take a look at the bottom of page  
3 3 of your report. It says, where it's the last  
4 full paragraph, it says, "It is also clear that  
5 the philosophy would forego potential higher  
6 profit opportunities in order to avoid risk of  
7 loss. For example, being out of the market  
8 around highly volatile periods during which  
9 options expire would be part of the philosophy."

10 Did you do an analysis to  
11 determine if -- strike that.

12 Do you have an understanding of  
13 when Mr. Madoff was out of the market?

14 A. I have an understanding that there  
15 were times when he was out of the markets, yes.

16 Q. And do you have an understanding  
17 of what those times were?

18 A. Well, they were generally at the  
19 end of -- I believe it was the end of quarters  
20 or the end of the year, for sure.

21 Q. And were those -- did you do any  
22 analysis to determine if those were highly  
23 volatile periods of time when he was out of the  
24 market?

25 A. I didn't do an analysis

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1 specifically, but having been a fund manager  
2 myself for many years, I know that there are  
3 certain times during the year, and very  
4 definitely at the end of the year, when, for a  
5 combination of reasons markets and individual  
6 securities are unusually volatile.

7 Q. But you didn't do an analysis on  
8 the transactions that were occurring in  
9 Mr. Madoff -- in the Madoff fund BLMIS accounts,  
10 did you?

11 A. No. It was sufficient for me to  
12 understand that there were times when the  
13 markets were volatile. And that I would  
14 understand why someone would choose not to be in  
15 markets at those particular times to avoid that  
16 particular volatility.

17 Q. Did you make a determination if  
18 the market was particularly volatile at the end  
19 of each quarter?

20 A. Again, my experience as a fund  
21 manager is that there were times when markets,  
22 and particularly individual stocks, were  
23 particularly volatile at the end of each  
24 quarter, largely because many funds would engage  
25 in what was typically called window dressing.

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1 how Mr. Merkin was able to predict the market  
2 movement?

3 A. I don't know how he was able to  
4 predict the market movement, but it was pretty  
5 clear to me that over the period, at least one  
6 or two of the periods that I looked at, that he  
7 was able to take advantage of a market movement  
8 that was unusual and was not sustainable for the  
9 entire year. And that's why I was able to make  
10 the statement that had he been engaging in a  
11 split-strike conversion strategy and implement  
12 it at the beginning of the year and took it off  
13 at the end of the year, his returns might not  
14 have been as good as the returns he generated,  
15 or allegedly generated, because he was able to  
16 take advantage of intra-year market movement  
17 that enhanced his returns.

18 Q. And did you find this to be true  
19 for the handful of transactions that you looked  
20 at?

21 A. Yes.

22 Q. And when you say you looked at  
23 transactions, are you looking -- is it more than  
24 ten transactions?

25 A. No. I actually only looked at a

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1 few -- a couple of transactions that I remember.  
2 I mean, I didn't go through many of them, but I  
3 looked at a couple and was able to see exactly  
4 how he was able to do -- how he was able to  
5 generate returns. For example, how he was able  
6 to generate positive returns in down markets.

7 Q. Okay. When you say a couple of  
8 transactions, are you saying two or three  
9 transactions?

10 A. Yes.

11 Q. And for what time period were  
12 those transactions?

13 A. Again, it was a while ago, so I  
14 don't remember exactly. I think one was in  
15 mid-2000s, 2004, something like that, and one  
16 was in 2007. Those are the only two that I  
17 remember off the top of my head.

18 Q. So other than those two and  
19 possibly a third, you didn't look at any other  
20 transactions in the Merkin fund BLMIS accounts?

21 A. I don't remember looking at any  
22 others but, again, I looked at those two and I  
23 got a pretty good idea of how the timing of the  
24 investments would generate significant benefits  
25 over a buy/hold split-strike conversion

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1           A.        Could you repeat that question.

2           Q.        Did you confirm or do any analysis  
3 to confirm that execution -- strike that.

4                   Did you do any analysis to confirm  
5 that the returns in the Merkin fund BLMIS  
6 accounts were the result of Madoff's  
7 particularly good execution?

8           A.        I did not do any myself. As I  
9 said, there were enough people who did that  
10 analysis or believed that execution was superior  
11 and that would have enhanced the returns.

12 Again, over what you might consider  
13 straightforward split-strike conversion  
14 strategy.

15           Q.        And who are you referring to when  
16 you say enough people did that analysis?

17           A.        Well, for example, Mr. Pomerantz  
18 was one of them.

19           Q.        And you reviewed Dr. Pomerantz's  
20 report? Did you review Dr. Pomerantz's report  
21 in preparation of your rebuttal report?

22           A.        Yes. And I read his transcript, I  
23 think I said, subsequent to my coming here --  
24 prior to my coming here, subsequent to my  
25 submitting the rebuttal.

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1           Q.       Take a look at page 4 of your  
2 report.

3           A.       Yes.

4           Q.       The top partial paragraph where it  
5 says, "Mr. Merkin understood." Do you see that?

6           A.       Yes.

7           Q.       It says: "Mr. Merkin understood  
8 that Mr. Madoff had, by virtue of his long  
9 experience, the knowledge and ability to take  
10 advantage of both market timing and stock  
11 selection to improve returns over that which  
12 would have been generated by a formulaic putting  
13 on of the trades."

14                  Do you see that there?

15           A.       Yes.

16           Q.       How did you come to that  
17 understanding?

18           A.       Which understanding is that?

19           Q.       Can you explain what you mean  
20 there in that sentence?

21           A.       Well, what I meant was that  
22 Mr. Merkin believed, understood, that Madoff's  
23 ability to predict short-term market movements  
24 would be an important factor in his ability to  
25 generate returns, and that the ability to

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1 predict short-term market movements was some  
2 combination of a model, access to order flow and  
3 his vast experience in the marketplace.

4 Q. How do you know this is what  
5 Mr. Merkin believed?

6 A. Again, in reading various of his  
7 notes and testimonies, depositions, when asked  
8 to explain how he thought Madoff generated  
9 returns, this was my interpretation and my  
10 summary of all of the various comments that  
11 Mr. Merkin made. It was certainly the inference  
12 that I drew from the various comments that  
13 Mr. Merkin made about the alleged returns that  
14 Madoff was making.

15 Q. Do you know if Mr. Merkin  
16 confirmed that Madoff's ability to predict  
17 short-term market movements and his ability  
18 to -- strike that.

19 Do you know if Mr. Merkin  
20 confirmed that Mr. Madoff's ability to predict  
21 short-term market movements was a factor in  
22 generating the returns in the BLMIS accounts?

23 A. I don't know what Mr. Merkin or  
24 how Mr. Merkin confirmed that. As I said, I  
25 inferred from many of his comments that that is

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1 certainly what he believed.

2 I could certainly imagine, for  
3 example, that in looking how the fund performed  
4 in, for example, down markets, how he could have  
5 timed things such that he could make money, he  
6 would have certainly seen that there were times  
7 when the market was down and Madoff did make  
8 money, but exactly how he confirmed in his own  
9 mind I'm not entirely sure.

10 But as I said, I inferred from the  
11 many comments that he made that he actually  
12 believed that some combination of vast  
13 experience in the market, access to order flow,  
14 perhaps a proprietary model, all contributed to  
15 his ability to time the market such that he  
16 could earn returns above those which a  
17 straightforward split-strike conversion strategy  
18 would have returned and, indeed when I looked at  
19 some of the results I was able to confirm in my  
20 own mind how he was able to do that, and that  
21 his market timing ability clearly was  
22 demonstrable.

23 Q. Can you turn to page, in your  
24 rebuttal report, which is the second exhibit,  
25 take a look at page 2 of that report.

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1 think he had an ability to time the markets, I  
2 wasn't only referring to market direction. I  
3 said he was able to time pricing of some of the  
4 options, and what goes into the pricing of  
5 options is both direction and the implied  
6 volatility in the option.

7 And it appeared in the times that  
8 I was looking at is that he was able to make  
9 money in down markets because of the way he was  
10 able to take advantage of the pricing of the  
11 options.

12 Q. And is that a skill set that you  
13 say that you don't have?

14 A. Among the many, yes.

15 Q. And are there any other skill sets  
16 that would attribute to making money in a down  
17 market?

18 A. Well, I'm sure there are many  
19 other skill sets that could allow you to make  
20 money in a down market. So I was particularly  
21 focused on what Madoff allegedly was doing in  
22 order for him to have made money in a down  
23 market.

24 As I said, at the initial stages,  
25 and indeed again when I was looking at that

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1 array of statistics that you were showing me,  
2 that I would expect that Mr. Madoff would have  
3 been able to make money in up markets, perhaps  
4 not as much, and would not lose as much in down  
5 markets.

6 Q. And the array of statistics, are  
7 you talking about the statistics set forth in  
8 the Promeo document?

9 A. Yeah, I'm talking about the  
10 statistics that you had me look at before and,  
11 as I said, at the initial stages that if I think  
12 about -- if I thought about the philosophy and  
13 the process and procedures as he outlined, I  
14 would expect to see that in terms of the  
15 performance.

16 And what I was curious about was  
17 how he was actually able to make money in down  
18 markets, and in the couple of instances that I  
19 looked at, he was able to make money because he  
20 was able to time accurately the pricing of some  
21 of the options.

22 Q. Do you know if -- strike that.

23 And this is what you did in order  
24 to understand how Mr. Madoff was making money in  
25 a down market; is that correct?

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1 A. It's what I looked at, yes.

2 Q. And do you know for a fact if

3 Mr. Merkin was also -- went through a process

4 similar to what you just explained?

5 A. I don't know what Mr. Merkin might  
6 have done but I, again, as I said, in various  
7 things that I had read, Mr. Merkin believed that  
8 through some combination of experience in the  
9 markets, access to order flow, that he was able  
10 to time the pricing of securities in a way that  
11 would allow him to generate returns.

12 Q. But you don't know if Mr. Merkin  
13 actually did an analysis of order flow to  
14 determine if the returns in the Madoff fund  
15 BLMIS accounts were the result of order flow; is  
16 that correct?

17 MR. STEINER: Objection to form.

18 MS. HOANG: I'm sorry, let me  
19 rephrase it.

20 Q. Do you know for a fact if  
21 Mr. Merkin actually did an analysis to determine  
22 if the returns in the Madoff BLMIS account was  
23 the result of order flow?

24 MR. STEINER: Objection to form.

25 A. I don't know if he did, but I

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1 don't know how you could possibly determine  
2 that.

3 So, I think what I said was that  
4 in various things that I have read, I inferred  
5 that Mr. Merkin knew that Mr. Madoff had, by  
6 virtue of his long experience in the markets and  
7 potentially by virtue of his access to order  
8 flow, that he was capable of using that to time  
9 the markets in order to produce the returns that  
10 he was producing.

11 Q. Do you know if Mr. Merkin actually  
12 verified that the access to order flow could  
13 generate the returns that were in the Madoff  
14 fund accounts?

15 A. I'm sorry, that's not what I said.  
16 What I said was that I believed that -- I  
17 inferred from what Mr. Merkin said that he knew  
18 that some combination of market experience and  
19 knowledge and access to order flow could, and  
20 indeed would be used to help him time the  
21 markets and producing superior returns. That's  
22 as much as I know.

23 Q. And you're inferring that based on  
24 the documents that --

25 A. Based on a whole array of things

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1       returns in down markets that you consider for  
2 market timing?

3           A.       The answer to that question is  
4 yes, and it also -- what I indicated is that it  
5 is also the pricing of individual securities,  
6 and in some cases the pricing of options, which  
7 is a skill that he apparently had. And when I  
8 say he apparently had, as I indicated earlier,  
9 had he actually made the investments that he  
10 said he made, he would have made money in a down  
11 market.

12                  So there was no chicanery, there  
13 was no -- this was actually not influenced by  
14 the fraud in any way. That if he indeed had  
15 made the investments that he allegedly made over  
16 that period of time, he would have made money in  
17 a down market, and the ability to do that was a  
18 function of his ability to accurately take  
19 advantage of the pricing of certain of the  
20 instruments in which he was investing.

21           Q.       So pricing is a component of your  
22 market timing, your understanding of market  
23 timing --

24           A.       The timing of the pricing of those  
25 instruments, yes, absolutely.

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1           Q.       Do you know for a fact whether  
2     Mr. Merkin also had this same understanding?

3           A.       I don't know what Mr. Merkin's  
4     understanding was, other than what I said  
5     before, that I inferred that he believed that  
6     amongst Mr. Madoff's abilities and amongst the  
7     tools that Mr. Madoff could use to generate  
8     superior returns, were his ability, by virtue of  
9     his experience and perhaps access to order flow,  
10    to time the markets and accurately predict price  
11    movements in the instruments to generate those  
12    returns.

13          Q.       Mr. Weingarten, can you take a  
14    look at page 4 of your report, your initial  
15    report. It's paragraph 4 of that report.

16          A.       Page --

17          Q.       Page 4, paragraph 4.

18          A.       Beginning with?

19          Q.       Let me double check that  
20    reference. Hold on one second.

21                   It's the fourth full paragraph,  
22    it's the last sentence.

23          A.       "It was clear from the outset that  
24    Mr. Merkin --"

25          Q.       Yes. If you look at, "In my

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1       opinion."

2           A.       Yes.

3           Q.       Is it your opinion that Mr. Merkin  
4       could rely in large part on Mr. Madoff's  
5       reputation as part of his due diligence?

6           A.       Yes.

7           Q.       And is it your opinion -- strike  
8       that.

9                   And do you have an understanding  
10      of what Mr. Merkin's knowledge of Mr. Madoff's  
11      reputation was?

12          A.       Yes, I have an understanding of  
13       it.

14          Q.       Can you tell me.

15          A.       But it's my understanding, not  
16       necessarily his understanding, but my  
17       understanding was that, as I indicated in here,  
18       there was a long-standing relationship that was,  
19       in part, personal, in part professional, and in  
20       part having to do with the positions of  
21       responsibility that he held within the financial  
22       community. And indeed one that was augmented by  
23       many in-person meetings over the period of time  
24       in which he was investing.

25          Q.       Do you have an understanding of

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1 Madoff was able to generate positive returns in  
2 a down market. And why, if those circumstances  
3 were repeated, he would always generate positive  
4 returns in down markets.

5 Q. And that's based on looking at  
6 those two or three transactions that you  
7 referred to before in 2004, 2007; is that  
8 correct?

9 A. Looking at those transactions,  
10 understanding why the underlying pricing of some  
11 of the instruments in which he invested could  
12 generate the kinds of returns he did, and  
13 understanding that, as I said, under similar  
14 conditions he would almost always, if not  
15 always, generate positive returns in down  
16 markets, yes.

17 Q. And do you have an understanding  
18 if Mr. Merkin performed the type of analysis  
19 that you've just described in order to determine  
20 the positive returns in a down market?

21 A. As I said before, I'm not sure  
22 what analysis Mr. Merkin did. I infer from  
23 everything that Mr. Merkin -- not everything. I  
24 infer from the things that Mr. Merkin has said,  
25 that he understood that through some combination

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1 of experience, access to order flow, that Merkin  
2 was able -- sorry. That Madoff was able to use  
3 a variety of tools to time markets and price  
4 instruments in a way that would permit him to do  
5 substantially better than the market over a  
6 period of time.

7 And that presumably, and again  
8 this is not -- I would infer that since he was  
9 looking at the performance on a fairly regular  
10 basis, he would have been aware that there were  
11 occasions in which Madoff allegedly made money  
12 in down markets.

13 Q. Can you turn to page 5 of your  
14 initial report. You see that second full  
15 paragraph, the first two sentences -- first  
16 three.

17 A. I'm sorry, the first full  
18 paragraph?

19 Q. The second full paragraph.

20 A. Second full paragraph.

21 Q. Apologize for that. Starts,  
22 "Another, but absolutely critical, part." Do  
23 you see that?

24 A. Yes.

25 Q. If you could take a look at --

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1 actually, just take a look at the whole  
2 paragraph.

3 A. Yes.

4 Q. And when you say in that second  
5 sentence, "by that I mean get your money back,"  
6 are you talking about redemptions?

7 A. Yes.

8 Q. Have you reviewed the redemption  
9 history of the Merkin funds?

10 A. I have not gone through ever  
11 request for redemption to see if it was met.

12 Q. Okay. And when we're talking  
13 about redemptions, I just want to make sure  
14 we're on the same page. It's redemption request  
15 to BLMIS is what we're talking about?

16 A. Yes.

17 Q. Are you aware that there's periods  
18 of years where there was no redemptions from the  
19 Merkin funds to -- no redemption request from  
20 the Merkin funds to BLMIS?

21 A. I'm not aware of it but it  
22 wouldn't surprise me if that were the case.

23 Q. Why wouldn't it surprise you?

24 A. It would be unusual in a fund that  
25 was performing consistently well to have massive

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1 with -- not something I concerned myself with.

2 Q. Okay. Would the ability to take  
3 redemptions in a hedge fund be a characteristic  
4 that you expect to see in all hedge funds?

5 A. So, hedge funds have various  
6 policies with respect to redemption. And some  
7 of them limit redemptions to monthly, some to  
8 quarterly, some to annually. Some limit  
9 redemptions in absolute terms.

10 So there are varying degrees in  
11 which hedge funds permit redemptions from their  
12 funds.

13 Q. Do you know what the redemption  
14 policy was at BLMIS?

15 A. I'm not aware of any stated  
16 redemption policy, and so I would infer from  
17 that that there was monthly liquidity in the  
18 Madoff funds.

19 Q. When you mean monthly liquidity,  
20 are you talking about the availability of monies  
21 in the Madoff funds, or -- strike that.

22 What are you talking about when  
23 you talk about monthly liquidity?

24 A. So that if you had an investment  
25 with Madoff funds and you wanted to withdraw

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1 ERRATA SHEET

2 WITNESS NAME : JEFFREY M. WEINGARTEN

3 PAGE/LINE CHANGE REASON

4 See attached errata sheet

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***Picard v. J. Ezra Merkin, et al., No. 09-1182 (SMB)***  
**Errata to the Transcript of the Deposition of Jeffrey M. Weingarten**  
**July 15, 2015**

Cite	Original Text	Change	Reason
20:12	broker-dealer and asset management	broker-dealer and asset manager	Clarity/Typo
28:4-5	Goldman Sachs asset management international	Goldman Sachs Asset Management International	Typo
30:21	swarth	swath	Typo
31:3	an investment opportunities	an investment opportunity	Typo
50:4	at all time	at all times	Typo
77:3-4	I think there are three other people directly report to him.	I think there are three other people who directly report to him.	Clarity/Typo
111:14	GSAMs, Golden Sachs asset management	GSAM, Goldman Sachs Asset Management	Typos
113:23-24	A. Um-hum. It's the second from the last paragraph, "It is very clear."	A. Um-hum. Q. It's the second from the last paragraph, "It is very clear."	Clarity/Typo
115:16-17	other people who investment philosophy	other people whose investment philosophy	Clarity/Typo
118:23-24	understanding of what it was his investment philosophy was	understanding of what his investment philosophy was	Clarity/Typo
134:9-10	there would be different return profile	there would be a different return profile	Clarity/Typo
147:9	times that options expiration.	times that options expire.	Clarity/Typo
173:3	would not have produced the kind of results.	would not have produced those kind of results.	Clarity/Typo
189:9-10	when Mr. Merkin was investing with Mr. Madoff was still receiving	when Mr. Merkin was investing with Mr. Madoff, I was still receiving	Clarity/Typo
193:11	from most of my tenure	for most of my tenure	Typo
219:7	offered me \$400 billion	offered me \$400 million	Clarity/Typo
231:6-7	you would experience massive redemptions.	you would not experience massive redemptions.	Clarity/Typo

Picard v Merkin

Weingarten 7/15/2015

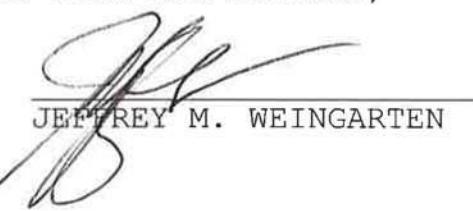
CONFIDENTIAL

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1

JURAT

2 I, JEFFREY M. WEINGARTEN, have  
3 read the foregoing deposition and hereby affix  
4 my signature that same is true and correct,  
5 except as noted above.

6   
JEFFREY M. WEINGARTEN

7

THE STATE OF New York

8

COUNTY OF New York

9

10 Before me, Connie Liu, on this  
11 day personally appeared Jeffrey M. Weingarten,  
12 known to me (or proved to me on the oath of or  
13 through passport (description of identity  
14 card or other document) to be the person whose  
15 name is subscribed to the foregoing instrument  
16 and acknowledged to me that he/she executed the  
17 same for the purpose and consideration therein  
18 expressed.

19 Given under my hand and seal of office on  
20 this 13<sup>th</sup> day of August, 2015.

21

CONNIE LIU

22

NOTARY PUBLIC-STATE OF NEW YORK

23

No. 01LI6285845

24

Qualified In Kings County

25

My Commission Expires July 15, 2017

  
NOTARY PUBLIC IN AND FOR  
THE STATE OF NY

26

27 My Commission Expires: July 15, 2017.

BENDISH REPORTING

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